SOME NECESSARY AMENDMENTS OF THE NEGOTIABLE INSTRUMENTS LAW.[1]

II.

Sixth. Section 64–1 and 64–2 [43] should be amended so as to read as follows:

"1. If the instrument is *a bill or note* payable to the order of a third person, or is *an accepted bill payable to the order of the drawer or to bearer,* he is liable to the payee and to all subsequent parties.

"2. If the instrument is *a note or unaccepted bill* payable to the order of the maker or drawer or payable to the bearer, he is liable to all parties subsequent to the maker or drawer."

The American law has long recognized the liability to the payee of a bill or note of one who indorsed it before delivery for the purpose of backing the drawer or the maker, although there was great conflict as to the nature of the liability. In some states such backer was held as a maker or drawer, in others as an indorser, and in others as a guarantor.[44] Section 64–1–2 as enacted makes such a signer an indorser liable to the payee except when the instrument is payable to the order of the maker or drawer or is payable to bearer. There is no reason in the nature of things why a backer for the accommodation of the acceptor should not be liable to the drawer when the drawer is the payee, and such is the law on the continent of Europe.

Professor Ames while commending section 64 as being an other-

[1] Because of the great diversity in the sectional numbering of the act as adopted in the different states, it has been thought best to use in this article the numbers as they appear in the act as recommended by the Commissioners on Uniform Laws. The corresponding sections of the act in the various states can be found in the Table in Brannan's Negotiable Instruments Law, p. xxii.

[43] Section 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as an indorser, in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

[44] See 1 Ames, Cases on Bills and Notes, 269, n. 1.

wise excellent piece of codification suggested the amendments above set out [45] and illustrated the necessity therefor by this example:

"If A. makes a note payable to X. or order, gets B. to indorse it and delivers it to X. in exchange for goods, B. is liable, under this section, to X. and all subsequent parties. If, however, A. accepts a bill drawn by X., payable to the order of X., gets B. to indorse it, and delivers it, as before, to X. for goods purchased, B., under this section, is not liable to X., but only to subsequent holders. And yet the business relations of A., B., and X. are obviously identical in the two cases. In each X. sells to A. on credit, trusting to the responsibility of both A., the buyer, and B., the surety." [46]

Seventh. The first clause of section 70 [47] should be amended so as to read as follows:

"Presentment for payment is not necessary, *except in the case of bank notes and certificates of deposit,* in order to charge the person primarily liable on the instrument."

Section 70 as enacted was, of course, intended to apply to the maker of a note and the acceptor of a bill, and its effect upon certificates of deposits and bank notes was evidently overlooked. Under this section as it now is, the Statute of Limitations would begin to run against certificates of deposit and bank notes immediately upon their issue. The absurdity of this result is evident as to bank notes which are intended to circulate indefinitely. As to certificates of deposit, the weight of authority is that they must be presented to charge the bank,[48] while four states hold that presentment is not necessary.[49]

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[45] The words "or bearer" after "drawer" in the first paragraph of the amended section have been added by the writer to cover the case of a bill drawn payable to bearer and accepted before negotiation by the drawer. In such case the drawer as bearer should be able to hold the backer for the acceptor.

[46] For further discussion of this point see Brannan, Negotiable Instruments Law, 2 ed., pp. 171, 187, 198, 209, 262, 263, 264.

[47] Section 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument.

[48] Hillsinger *v.* Georgia Railroad Bank, 108 Ga. 357, 33 S. E. 985 (1899); Brown *v.*

[49] Brummagim *v.* Tallant, 29 Cal. 503 (1866); Tripp *v.* Curtenius, 36 Mich. 494 (1877); Mitchell *v.* Easton, 37 Minn. 335, 33 N. W. 910 (1887) (but the right to sue a bank on a general deposit does not accrue nor the Statute of Limitations begin to run until demand of payment unless demand is in some way dispensed with, Branch *v.* Dawson, 33 Minn. 399, 23 N. W. 552 (1885)); Curran *v.* Witter, 68 Wis. 16, 31 N. W. 705 (1887).

No one would deny that a demand is necessary to set the Statute of Limitations running against an ordinary deposit in a bank. The mercantile world regards certificates of deposit in the same way, and by the custom of merchants the holder of such a certificate is a depositor who like the ordinary depositor may leave the money in the bank indefinitely without being barred by the statute.

Eighth. For the same reasons that require the amendment of section 70, section 53 [50] should be amended so as to read as follows:

> "Where an instrument payable on demand, *other than bank notes and certificates of deposit*, is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

If an instrument is not due without demand so as to charge the maker, no passage of time before demand should be regarded as a dishonor so as to make a transferee before demand subject to equities.

Ninth. The last paragraph of section 71 [51] should be amended so as to read:

> "Where it is payable on demand, presentment must be made within a reasonable time *after its indorsement in order to charge the indorser, and in case of a bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer.*"

Why section 71 departs in this paragraph from the provisions of the Bills of Exchange Act, which are the same as the suggested

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McElroy, 52 Ind. 404 (1876); Elliott *v.* State Bank, 128 Ia. 275, 103 N. W. 777 (1905) (overruling Mereness *v.* First Nat. Bank, 112 Ia. 11, 83 N. W. 711 (1900)); Fells Point Savings Institution *v.* Weedon, 18 Md. 320 (1862); Shute *v.* Pacific Nat. Bank, 136 Mass. 487 (1884); Howell *v.* Adams, 68 N. Y. 314 (1877); Cottle *v.* Marine Bank, 166 N. Y. 53, 58, 59 N. E. 736, 737 (1901) (so also as to certificates of deposit issued by an individual, Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186 (1885)); Bank of Commerce *v.* Harrison, 11 N. M. 50, 66 Pac. 460 (1901); McGough *v.* Jamison, 107 Pa. St. 336 (1884); Tobin *v.* McKinney, 15 S. D. 257, 88 N. W. 572 (1901); Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377 (1867); Riddle *v.* First National Bank, 27 Fed. 503 (1886).

[50] Section 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

[51] Section 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

amendment, is not apparent. Probably in the effort at condensation the effect of the condensed statement was overlooked. At any rate, the consequences are most undesirable. Following the plain language of section 71 the Supreme Court of Wisconsin held [52] that delay, although unreasonable, between the date of a demand draft and its negotiation to the plaintiff was immaterial if the draft was presented for payment within a reasonable time after its negotiation to the plaintiff. If, for example, in a jurisdiction where an action on such an instrument is barred in six years, the payee of a bill of exchange payable on demand should indorse it to A. and A. should hold it without presentment over five years, any court would say that A. had held the bill an unreasonable time and that he could not recover against the drawer or indorsers. But if, after holding the bill so long, A. should negotiate it to B. the latter could hold the drawer and indorsers, if he presented the bill for payment within a reasonable time after he received it even though this might be just before the expiration of the six years. Such a result would be unjust and contrary to business usage and should be avoided by amendment of the section.

Again, section 185 defines a check to be a bill of exchange drawn on a bank payable on demand and provides that, except as otherwise provided, the provisions of the act applicable to a bill of exchange payable on demand shall apply to a check. Section 186 provides that a check must be presented for payment a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. If the loss, for instance, should be fifty per cent of the amount of the check, the drawer, by the combined effects of sections 185 and 186 would be discharged to the extent of fifty per cent. But section 186 makes no exception in favor of the indorser and does not discharge him to the extent of the loss caused by the delay. It would be most inequitable if the drawer is discharged to the extent of fifty per cent and the indorser not at all. It may be argued that the indorser would be discharged under section 120–3 which provides that a person secondarily liable on the instrument is discharged "by the discharge of a prior party." There is some doubt, however, whether the partial discharge of a prior party would come within

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[52] Columbian Banking Co. *v.* Bowen, 134 Wis. 218, 114 N. W. 451 (1908).

the section, and whether the indorser would be discharged either wholly or in part. At all events, the rights of the indorser ought not to be jeopardized when the doubt can be cleared up by the simple amendment above suggested.

Tenth. Section 85 [53] should be amended so as to read:

"Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon *Saturday*, Sunday or a holiday, the instrument is payable on the next succeeding business day *which is not a Saturday*. Instruments payable on demand may at the option of the holder be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday."

The third sentence of section 85 presents the anomaly that while an instrument falling due on Saturday must be presented on Monday in order to charge drawer and indorsers, yet if the instrument is payable at a special place and the person primarily liable is able and willing to pay it there at maturity, it must by the provisions of section 70 [54] be presented on Saturday in order to charge the parties liable for such payment with interest after Saturday. Section 85 presents also the further anomaly that if an instrument payable on Saturday is presented on that day and payment is refused, the instrument is dishonored by the maker so far as concerns his liability but not as to the indorser, to charge whom the instrument must be again presented on Monday. The maker could be held on Saturday, although as to the indorsers the note has not been dishonored.

Another question of serious moment to collecting banks also arises under section 85. Suppose that presentment on Saturday would have secured payment but the instrument is dishonored

[53] Section 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday when that entire day is not a holiday

[54] Section 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

when presented on Monday because of bankruptcy or other cause, is not the collecting bank guilty of negligence and liable therefor to its correspondent? In an article by Professor Williston [55] this question is discussed in the light of an instance in which the question of interest after Saturday became of importance, and which led to an act of the Massachusetts Legislature amending section 85 in the manner above suggested.[56]

Eleventh. Section 119 [57] should be amended so as to read:

> "A negotiable instrument is discharged:
>
> "1. By payment in due course by or on behalf of the *person primarily liable;*
>
> "2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
>
> "3. By the intentional cancellation thereof by the holder;
>
> "4. When the *person primarily liable* becomes the holder of the instrument at or after maturity in his own right."

The changes in this section consist in striking out paragraph (4) from the original section, in changing the number of paragraph (5) to (4), and in substituting the words "primarily liable" for "principal debtor" in paragraphs (1) and (4).

Paragraph (4) of section 119 as it now stands is contrary to the law and mischievous. Payment of a simple contract debt before

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[55] 23 Harv. L. Rev. 603.

[56] A proviso was also added by the Massachusetts Legislation as follows: "provided, however, that no person receiving any check, draft, bill of exchange, or promissory note payable on demand shall be deemed guilty of any neglect or omission of duty or incur any liability for not presenting for payment or acceptance or collection such check, draft, bill of exchange or promissory note on a Saturday; provided, also, that the same shall be duly presented for payment or acceptance or collection on the next succeeding business day." It is doubtful whether the proviso should be included in an amendment of section 85, since the question of negligence of a collecting agent may be affected by local usage and the circumstances of the case, and for this reason the proviso has been omitted from the amendment above suggested.

[57] Section 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

4. By any other act which will discharge a simple contract for the payment of money;

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.

maturity discharges the claim not only as to the creditor, but as to a subsequent assignee of the debt. But payment of a negotiable instrument before maturity has never been held a discharge of the instrument as against a subsequent holder in due course. Yet this paragraph makes such payment a discharge.[58] The change in the words "principal debtor" should be made to eliminate certain questions of suretyship from section 119. When the maker of a note whether principal or surety as between himself and an indorser pays or otherwise acquires the note at maturity, it is discharged. If the indorser is the principal debtor, the maker can recover from him but not on the note. But if an indorser who is, as between himself and the maker, the principal debtor, pays the note at maturity, then paragraph (2) covers the case.

Twelfth. Section 120 [59] should be amended so as to read as follows:

"Section 120. A *party to a negotiable instrument* is discharged:
"(1) By any act which discharges the instrument;
"(2) By the intentional cancellation of his signature by the holder;
"(3) By a valid tender of payment made by a prior party."

The substitution of the words "party to a negotiable instrument" for "person secondarily liable on the instrument" is made in order to distinguish between the discharge of the instrument as provided for in section 119 and the discharge of a party whether primarily or secondarily liable, leaving the instrument otherwise in force.

Paragraph (3) is eliminated because there are many cases in which, as pointed out by Professor Ames, the discharge of a prior party does not discharge one secondarily liable.[60] Paragraphs (5)

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[58] See fuller discussion of this point, Brannan, Negotiable Instruments Law, 2 ed., 174, 189, 200, 274–276, 294.

[59] Section 120. A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right to recourse against such party is expressly reserved.

[60] Brannan, Negotiable Instruments Law, 2 ed., 276–278, 294, 295.

and (6) are stricken out because the Negotiable Instruments Law could not and does not attempt to state fully all of the cases in which the law of suretyship may lead to changes in the liability of parties to bills and notes. As it is impossible to cover the subject of suretyship in the act, it is better to omit paragraphs (5) and (6) and to retain paragraph (4) as paragraph (3) in the proposed amendment, leaving the subject to be dealt with in each jurisdiction according to the law of suretyship in such jurisdiction.

Sections 119 and 120 have already had an unfortunate effect in reversing established and just rules of suretyship as applied to negotiable bills and notes and have prevented the uniformity which it was the object of the act to secure. Parol evidence has long been admitted in England and almost everywhere in this country to show that the holder when he took an instrument, on which one of two or more joint makers or acceptors was a surety, knew that fact, and it has been held in such jurisdictions that such holder could not give a binding extension of time to the surety or impair his rights in certain other ways without discharging the principal, and the same rule was applied to a sole maker or an acceptor who was known to have signed for the accommodation of the drawer or payee-indorser. In most jurisdictions also the same effect was given to the knowledge of the suretyship relation even though the holder acquired the knowledge after he took the instrument.[61] But the construction put by the supreme courts of six states upon sections 119 and 120 of the act completely reverses this equitable and almost universal rule, such courts having held that an extension of time given by a holder to a maker with knowledge of the fact that the maker was a surety did not discharge the surety; also that time given to an accommodated payee by a holder with knowledge of the accommodation did not discharge the accommodating maker.[62]

[61] See Professor Hening in 59 U. of P. Law Rev. 532 *et seq.* for collection of cases in England and America.

[62] Fritts *v.* Kirchdorfer, 136 Ky. 643, 650, 124 S. W. 882 (1910) (but see Farmers' Bank *v.* Wickliffe, 134 Ky. 627, 121 S. W. 498 (1909)); Vanderford *v.* Farmers' & Mechanics' Bank, 105 Md. 164, 66 Atl. 47 (1907); Union Trust Co. *v.* McGinty, 212 Mass. 205, 98 N. E. 679 (1912); National Citizens' Bank *v.* Toplitz, 81 N. Y. App. Div. 593, affirmed on another ground, 178 N. Y. 464, 71 N. E. 1 (1904) (but in Building & Engineering Co. *v.* Northern Bank, 99 N. E. 1044 (Nov., 1912), the Court of Appeals of New York, without passing on the question whether under the Negotiable Instruments Law and in an action at law the accommodating maker of a note must

One supreme court has, however, held that sections 119 and 120 apply only to holders in due course, and that a payee with notice that a maker was a surety discharged the surety by giving time to the principal maker without the consent of the surety.[63]

It has been argued by the writer in another place [64] that sections 119 and 120 can be so construed as to avoid upsetting the established doctrines of suretyship, and in this he finds himself in company with several other writers.[65] But the course of decision has gone so far in one direction that even if other courts should take the contrary view from the courts which have already spoken, uniformity cannot be had. Nor can uniformity be obtained if all courts hereafter construing sections 119 and 120 should follow the six supreme courts which have treated the act as abrogating the former doctrine. In the first place, Iowa is at variance with the other courts, and in the second place, several states did not adopt sections 119 and 120 in the form recommended by the commissioners.[66]

Thirteenth. Section 137 [67] should be amended so as to read as follows:

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses *after the expiration of* twenty-four hours after such delivery or such *longer* period as the holder shall allow, to return the bill accepted or non-accepted, to the holder, he will be deemed to have *converted the same and shall be liable in damages for the amount of the bill.*"

absolutely be treated as primarily liable thereon and the accommodated indorser as secondarily liable, held, that, even assuming such to be the case, the court is not prevented in an action in equity from determining and enforcing the rights of the parties as the same are found as a matter of fact); Richards *v.* Market Exchange Bank, 81 Oh. St. 348, 90 N. E. 1000 (1910); Cellars *v.* Meachem, 49 Or. 186, 89 Pac. 426 (1907); Hunter *v.* Harris, 127 Pac. 786 (Or.), *semble*; Wolstenholme *v.* Smith, 34 Utah 300, 97 Pac. 329 (1908); Bradley Engineering Co. *v.* Heyburn, 56 Wash. 628, 106 Pac. 170 (1910).

[63] Fullerton Lumber Co. *v.* Snouffer, 139 Ia. 176, 117 N. W. 50 (1908).

[64] Brannan, Negotiable Instruments Law, 2 ed., 117.

[65] Professor Street, 11 Am. Law Notes, 105; Professor McGehee, 12 Am. Law Notes, 122; Hon. Amasa M. Eaton, Reports Am. Bar Association, 1907, p. 1164; H. H. McMahon, Esq., 8 Ohio L. Rep., 25.

[66] Wisconsin, Kansas, Illinois. Brannan, Negotiable Instruments Law, 2 ed., 120, 158; Professor Hening in 59 U. of P. Law Rev. 540–542.

[67] Section 137. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same.

By the custom of merchants and the common law, the drawee was entitled to twenty-four hours in which to decide whether to accept a bill or not. It could hardly have been the purpose of the draftsman of the act to allow the holder to shorten this time, and the word "other" was without doubt inadvertently used and should be changed for "longer."

The provision that a destruction or refusal to return the bill shall be deemed an acceptance makes a contract out of a tort. No such provision is found in the Bills of Exchange Act and the doctrine was expressly rejected in Jeune *v.* Ward.[68]

Aside from the unscientific character of the provision, it is unjust to the drawer and indorsers of the bill. If the bill is treated as accepted, it is not dishonored, and notice of dishonor cannot be given to the drawer and indorsers. But such an act as the destruction of the bill or refusal to return it shows clearly that the drawee does not intend to pay it. The drawer in ignorance of an act which indicates that his funds in the drawee's hands are in peril can take no steps to protect himself, and even if he is informed of the facts, what can he do since the bill is accepted?

The section has been condemned not only by Professor Ames, but also by Mr. Cohen, Q. C., of the English Bar and by Mr. McKeehan.[69]

There is still another objection to the section. What is meant by a "refusal to return the bill within twenty-four hours"? Is the mere failure to return it a refusal even though the holder has not called for it? Must the drawee see that the bill gets back to the holder before the expiration of the twenty-four hours or be held to have accepted it?

The section is a substantial reënactment of a New York statute under which it was held that mere retention by the drawee was not an acceptance; that the acts of the drawee must be such as amount to a conversion of the bill. And the same result was reached in the other states which had adopted similar statutes.[70].

But a demand for the return of the bill could certainly not be made within the twenty-four hours which the drawee was entitled

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[68] 1 B. & Ald. 653.

[69] Brannan, Negotiable Instruments Law, 2 ed., 166, 215, 282–284, 292.

[70] Matteson *v.* Moulton, 79 N. Y. 627; Dickinson *v.* Marsh, 57 Mo. App. 566 (1894); St. Louis & S. W. Ry. *v.* James, 78 Ark. 490, 95 S. W. 804 (1906).

to retain it, and if the demand is made after the expiration of the twenty-four hours and the drawee then refuses to return, how can he be said "to refuse *within* twenty-four hours after such delivery?"

If he is not bound to return so as to make his refusal an acceptance without a demand, and if a demand cannot be made until after twenty-four hours, the provision seems to be incapable of operation. The change from "within twenty-four hours" to "after the expiration of twenty-four hours" is made in the amendment in order to cure this difficulty. The Supreme Court of Pennsylvania has however held that under section 137 the presentation for acceptance is in itself a demand for acceptance which implies a demand for the return of the bill if it is not accepted, and that the mere failure to return the bill within twenty-four hours is an acceptance.[71] The court erroneously, as it is conceived,[72] applied the rule to a check, and held that the drawee bank became liable on a check which it had refused to pay, because, having given the check to a notary public to protest, he failed to return it in time for it to be returned to the holder within twenty-four hours from its presentation — a most unjust result.

In State Bank *v.* Weiss,[73] also, the court applied to a check the rule of this section that a drawee will be deemed to have accepted a bill which he does not return within twenty-four hours after its delivery for acceptance.

But the Pennsylvania case was followed by an act of the legislature amending section 137 by adding the words:

> "The mere detention of such bill by the drawee, unless its return has been demanded, will not amount to an acceptance; and provided further that the provisions of this section shall not apply to checks." [74]

So Pennsylvania, like the other states which have adopted the act, is again in the dilemma above indicated, and in Wisconsin the statute itself provides that the "mere retention of the bill is not an acceptance."

It is submitted that uniformity and scientific accuracy as well

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[71] Wisner *v.* First National Bank, 220 Pa. St. 21, 68 Atl. 955 (1908).

[72] Brannan, Negotiable Instruments Law, 2 ed., 135, 136.

[73] 46 N. Y. Misc. 93, 91 N. Y. Supp. 276 (1904).

[74] Laws of 1909, Act 169, April 27, 1909.

as justice to drawer and indorser require the amendment of section 137 in the manner suggested.

Fourteenth. Section 186 [75] should be amended so as to read as follows:

"A check must be presented for payment within a reasonable time after its issue *and notice of dishonor given to the drawer, as provided for in the case of bills of exchange,* or the drawer will be discharged to the extent of the loss caused by the delay."

Under section 89 [76] the drawer of a bill of exchange is absolutely discharged by failure to give him notice of dishonor even though he suffers no loss by such failure to give him notice. Section 185 provides that "except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check."

Now section 186 declares what shall be the effect on the liability of the drawer of failure to present the check for payment within a reasonable time, but says nothing as to the effect of failure to give notice of dishonor. Since no separate provision is made for this contingency as to a check, the provision of section 89 controls, and the drawer of the check will be absolutely discharged, although the delay has caused him no loss. This is contrary to the common law.[77]

The view here taken of the effect of section 89 is supported by several cases in the New York Appellate Division, where it has been held that under section 89 [78] notice of dishonor must be alleged in a complaint against the drawer of a check; [79] that judgment against the drawer of a check cannot be sustained in the absence of proof

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[75] Section 186. A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

[76] Section 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

[77] Clark *v.* National Bank, 2 MacArthur (D. C.) 249 (1875); Griffin *v.* Kemp, 46 Ind. 172 (1874); Gregg *v.* George, 16 Kan. 546 (1876); Stewart *v.* Smith, 17 Oh. St. 82 (1866); Purcell *v.* Allemong, 22 Gratt. (Va.) 739 (1872); *In re* Brown, 2 Story 502 (1843). See Daniel, Negotiable Instruments, 5 ed., sec. 1587.

[78] N. Y., Laws of 1897, c. 612, sec. 160.

[79] Ewald *v.* Faulhaber Stable Co., 55 N. Y. Misc. 275, 105 N. Y. Supp. 114 (1907).

of notice of dishonor to the drawer,[80] and that the drawer of a check is discharged by failure to give him notice of dishonor, the bank having refused to pay because it was short of funds and subsequently proving to be insolvent.[81]

The omission of a provision as to notice of dishonor of a check was an evident oversight which should be remedied, as was done in the Illinois act by the insertion of the suggested clause.

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[80] Kuflick *v.* Glasser, 114 N. Y. Supp. 870 (1909).

[81] Bacigalupo *v.* Parrilli, 112 N. Y. Supp. 1040 (1908).